



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-059

Construction et Gestion J.C.C. inc.

*Decision made
Thursday, September 9, 2010*

*Decision and reasons issued
Friday, September 17, 2010*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

CONSTRUCTION ET GESTION J.C.C. INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.
2. The complaint filed by Construction et Gestion J.C.C. inc. (J.C.C.) concerns a procurement (Invitation to Tender No. 529373) by the Department of Public Works and Government Services (PWGSC) on behalf of the Parks Canada Agency (Parks Canada) for the leasing of premises in Québec, Quebec.
3. J.C.C. alleged that it should have been awarded the contract since its proposal was the lowest-priced and met all the requirements of the invitation to tender.
4. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.”
5. Subsection 6(2) of the *Regulations* states that “[a] potential supplier who has made an objection . . . to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”
6. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.
7. On August 2, 2010, upon returning from vacation, J.C.C.’s representatives became aware of a PWGSC letter dated July 26, 2010, informing them that, further to a re-evaluation of Parks Canada’s operational requirements, it was cancelling the tendering process. On August 18, 2010, J.C.C. made an objection to PWGSC alleging the following: “On February 3, 2010, you issued a new invitation to tender . . . our client filed its proposal to which certain appendices were attached, as well as its letter of guarantee On April 20, 2010, you informed our client that it was the lowest-priced bidder . . . and that, consequently, its proposal had been successful On August 2, 2010, upon the construction industry’s return from vacation, our client’s representatives became aware of your July 26, 2010, letter informing them that you were cancelling the tendering process, without reasonable ground and without any justification” [translation].

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

8. On August 25, 2010, in response to this letter, PWGSC corrected certain facts to which the letter of objection alluded: "... PWGSC informed your client, by letter dated July 26, 2010, that 'further to a re-evaluation of Parks Canada's operational requirements' PWGSC had to cancel the tendering process. Furthermore, the security deposit was returned to your client on the same day on which the July 26 letter was sent. ... Consequently, PWGSC's position remains the same, as stated in the [note] of last July 26, that is, that the tendering process has been cancelled and that no contract was or will be awarded under this process" [translation].

9. As indicated above, a complaint must be filed with the Tribunal within 10 working days after the day on which the complainant has actual or constructive knowledge of the denial of relief. In this regard, the Tribunal concludes that the basis of its objection became known to J.C.C. at the latest on August 2, 2010, when it became aware of PWGSC's letter of July 26, 2010, which indicated that the department was cancelling tendering process. In other words, an objection should have been made or a complaint should have been filed at the latest on August 16, 2010, in order to comply with the time limits stipulated in section 6 of the *Regulations*. Since J.C.C. did not make its objection to PWGSC until August 18, 2010, and did not file its complaint with the Tribunal until September 3, 2010, the Tribunal concludes that the complaint was not filed on time.

10. Having said that, even if the complaint had been filed on time, the Tribunal could not have accepted the complaint because it did not relate to a "designated contract" as required by paragraph 7(1)(b)³ of the *Regulations*. Section 30.1 of the *CITT Act* defines a "designated contract" as "... a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations." The *Regulations* define a "designated contract" as any contract or class of contracts concerning a procurement of goods or services as described in Article 1001 of the *North American Free Trade Agreement*,⁴ Article 502 of the *Agreement on Internal Trade*,⁵ Article I of the *Agreement on Government Procurement*,⁶ Annex Kbis-01.1-2 of Chapter K-bis of the *Canada-Chile Free Trade Agreement*⁷ or Chapter 14 of the *Canada-Peru Free Trade Agreement*⁸ that has been or is proposed to be awarded by a government institution.

11. According to the information in the complaint, in a letter dated July 26, 2010, PWGSC informed J.C.C. that it was cancelling the tendering process and indicated the following:

This is further to your lease offer filed on April 20, 2010, concerning the above-mentioned project.

Further to a re-evaluation of Parks Canada's operational requirements for the Quebec region, we regret to inform you that *we must cancel the present* tendering process.

Consequently, the security deposit sent with your offer will be returned in the next few days.

[Emphasis added, translation]

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3. Subsection 7(1) of the *Regulations* states the following: "The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint: ... (b) the complaint is in respect of a designated contract ..."
 4. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [NAFTA].
 5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].
 6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].
 7. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [CCFTA]. Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.
 8. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [CPFTA].

12. The Tribunal determined the following in a previous decision: “Given that the solicitation at issue has been legitimately cancelled, there no longer exists a contract ‘that has been or is proposed to be awarded by a government institution’ as contemplated by section 30.1 of the *CITT Act*. Therefore, the complaint is not in respect of a designated contract.”⁹

13. Finally, even if the complaint had been filed on time and had related to a designated contract, the Tribunal would not have concluded, as required by paragraph 7(1)(c) of the *Regulations*, that it discloses a reasonable indication that the procurement has not been conducted in accordance with Chapter Ten of *NAFTA*, Chapter Five of the *AIT*, the *AGP*, Chapter *Kbis* of the *CCFTA* or Chapter 14 of the *CPFTA*, which all apply in this case.

14. Since the tendering process at issue has been cancelled, there no longer is a contract “. . . that has been or is proposed to be awarded by a government institution . . .” as required by section 30.1 of the *CITT Act*. Therefore, the complaint does not relate to a “designated contract”. Consequently, under subsection 30.13(1), the Tribunal does not have jurisdiction to inquire into the complaint.

15. In fact, the Tribunal notes that article 14a) of the invitation to tender states the following: “. . . the lessee reserves the right to terminate any further consideration of any offer . . .” [translation]. The Tribunal also notes that article 13v) states that the security deposits will be returned within 30 days following the “. . . termination of the tendering process.” [translation]. In referring to these two articles, the Tribunal observes that it is therefore possible for the government institution not to accept any offer, as provided by article 14a), and to cancel the tendering process in its entirety, as stated in article 13v), as the case may be. Furthermore, there is no evidence on file that indicates that the government institution has committed to awarding a contract to J.C.C. at the conclusion of the tendering process, which could have resulted in a “designated contract”. Consequently, the procedures followed and the process adopted by the department are consistent with the rules established in the invitation to tender. The allegations made by J.C.C. do not therefore disclose a reasonable indication that the provisions of the previously mentioned trade agreements were breached.

DECISION

16. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

9. *Re Complaint File by Canadyne Technologies Inc.* (27 March 2009), PR-2008-056 (CITT) at para. 7.